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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 776

LYMAN P. RHODES, JR., PETITIONER

versus

METROPOLITAN LIFE INSURANCE COMPANY,
A CORPORATION, RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT,

And

ACCOMPANYING BRIEF IN SUPPORT THEREOF

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LYMAN P. RHODES, JR., PETITIONER

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METROPOLITAN LIFE INSURANCE COMPANY,
A CORPORATION, RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petition of Lyman P. Rhodes, Jr., for review by this Court on writ of certiorari of a judgment and decree of the Circuit Court of Appeals for the Fifth Circuit rendered February 1, 1949 (R. 178) (see *Rhodes vs. Metropolitan Life Insurance Company*, Fifth C.C.A., 172 F. 2nd 183, Fed. Rep. 2nd Advance Sheets for March 14, 1949), wherein rehearing was denied March 31, 1949, (R. 195), with respect, represents that:

1.

PROVISIONS OF FEDERAL CONSTITUTION, FEDERAL STATUTES AND LOUISIANA STATUTES INVOLVED.

The following provisions of the Constitution of the United States, of the Statutes of the United States, and of the Statutes of Louisiana, are involved in this application:

Seventh Amendment to the Constitution of the United States:

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

Section 34 of the Judiciary Act of September 24, 1789, 1 Stat. at L. 92, Ch. 20, 28 U.S.C.A., Sec. 725:

> "Sec. 725. Laws of States as rules of decision. The laws of the several States, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply."

Act 227 of the Legislature of Louisiana for the year 1918, Sec. 2:

> "Sec. 2. That every policy of insurance issued or delivered within the State on or after the first day of January, nineteen hundred and seven, by any life insurance corporation doing business within the State shall contain the entire contract between the parties and nothing shall be incorporated therein by reference to any constitution, by-laws, rules, application or other writings unless the same are endorsed upon or attached to the

policy when issued; and all statements purporting to be made by the insured shall in the absence of fraud be deemed representations and not warranties, and no statement or statements not endorsed upon or attached to the policy when issued shall be used in defense of a claim under the policy unless contained in a written application and unless a copy of such statement or statements be endorsed upon or attached to the policy when issued. Any waiver of the provisions of this section shall be void."

2.

SUMMARY STATEMENT OF THE MATTERS INVOLVED

Petitioner, Lyman P. Rhodes, Jr., respectfully presents the following facts, to-wit:

First: On June 19, 1947, Jacob M. Dampf and plaintiff, business partners, applied for and obtained reciprocal policies with Metropolitan Life Insurance Company, each being named as beneficiary and owner of a policy insuring the life of the other for $20,000.00 (R. 2, 5, 15-C). The right to change the beneficiary was not reserved; plaintiff was the designated "owner" of the policy and had a vested interest therein (R. 154-157); the policies were business policies. The full premium due under each policy was paid (R. 2, 5). Mr. Dampf had other policies insuring his life totalling $25,000.00 with other persons, members of his family, named as beneficiary (R. 158); one such policy for the face value of $5,000.00 had previously been issued by respondent herein.

Second: Shortly after midnight on September 10-11, 1947, Jacob M. Dampf died suddenly of coronary thrombosis in the

fifty-third year of his life. (R. 2, 5, 15-A). Due proof of death was made to the defendant on or prior to September 30, 1947; defendant denied liability and suit followed (R. 2, 5, 6). Respondent in its answer contended that certain questions claimed to have been answered by the late Mr. Dampf in his application for the policy sued on, touching his past medical history, were answered fraudulently and falsely by Mr. Dampf, and the answer charged (Paragraph 7) that "These answers, and each of them, were all false and fraudulent, and were known by the said Dampf to be false and fraudulent at the time he made same, and that said answers were made by him for the purpose of deceiving defendant as to the true condition of his health in order to secure the issuance of said policy, which said policy would not have been issued had the true facts been disclosed to defendant." (R. 8).

Third: At the close of the evidence the Judge on motion of defendant, respondent, directed a verdict in its favor, and overruled the plaintiff's motion for a directed verdict in his favor (R. 120-123; 127). Much evidence offered by petitioner had been excluded (R. 15-C, 73-76, 77, 93, 95, 103, 104, 106, 108, 111, 112, 114, 116).

Fourth: The matters allegedly fraudulently concealed by Mr. Dampf were that he had consulted and been treated by Dr. E. K. Hirsch on February 28, 1947, March 5, 1947, March 19, 1947, and March 25, 1947, had been told by Dr. Hirsch that he had sugar in his urine and blood, and had been told by Dr. Hirsch that he had diabetes (R. 8).

Admittedly, the matters allegedly fraudulently concealed by Mr. Dampf had nothing whatever to do with his death; counsel for respondent so stated in his opening statement (R. 15-A).

Petitioner offered the policy, testified as to his identity, and rested his case (R. 15-B-19). Respondent then assumed the burden of proving the charges in its answer that the answers Mr. Dampf had given were false and fraudulent and known by him to be false and fraudulent, and had been made by him for the purpose of deceiving defendant as to the true condition of his health. There was no testimony whatever to the effect that Mr. Dampf's answers had been made fraudulently, and for the purpose of deceit. In fact, the Fifth Circuit Court of Appeals specifically refused to base its decision on fraud.

Dr. E. K. Hirsch, who repeatedly refused to qualify or testify as a medical expert (R. 32, 43, 45, 49), was respondent's main witness. He said that he saw Mr. Dampf on July 9, 1945, for a complaint of frequency and burning on urination (R. 31); he did not see Mr. Dampf again professionally (although they visited socially) until February 28, 1947, when Mr. Dampf had a complaint of boils (R. 31). Dr. Hirsch examined Mr. Dampf's urine and found sugar (R. 32), suggested a diet and certain home tests for sugar which the insured could himself make, and believed that Mr. Dampf had diabetes (R. 33, 34). He told Mr. Dampf that about March 5, 1947 (R. 34), and asked Mr. Dampf to continue to test his urine at home (R. 35). These tests were made and turned in to Dr. Hirsch. They showed that the trace of sugar almost immediately disappeared, and on March 19, 1947, when Dr. Hirsch saw Mr. Dampf for the third time in 1947, the urine was sugar free (R. 37). Dr. Hirsch again saw Mr. Dampf March 25th; there was no sugar in his urine (R. 37, 47). Mr. Dampf did not return to Dr. Hirsch thereafter. Accordingly the doctor saw Mr. Dampf on four occasions in 1947, beginning February 28,

1947, and ending March 25, 1947. Mr. Dampf was never hospitalized, saw no other doctor, was never confined to bed, and lost no time from his duties.

In a written statement submitted to respondent as part of the Proofs of Death, and offered in evidence as exhibit D-12 by the defendant, Dr. Hirsch specifically stated that Mr. Dampf had been sugar free since March 25, 1947, that the illness had not been of long duration, and that there were no findings (R. 173).

On June 19, 1947, Mr. Dampf was examined by a Baton Rouge doctor, Dr. Joseph J. Noto, Medical Examiner for respondent (R. 60). He was accepted and passed by Dr. Noto. Dr. Noto was not called as a witness by respondent. Before the policy was issued, a specimen of Mr. Dampf's urine was sent to the Home Office of respondent for analysis, and was found to be negative (R. 60, 61). A lay investigation into Mr. Dampf's condition of health, financial condition, habits, etc., was conducted by respondent with favorable results (R. 70). An Agent's Inspection Report on Mr. Dampf by respondent's local agent was favorable (R. 66).

Petitioner offered testimony of numerous persons, close associates of Mr. Dampf, to prove that at the time this policy was applied for and delivered the actions, conduct, and words of Mr. Dampf, the manner in which he lived and acted, indicated that he did not believe he was ill but indicated on the contrary that he was in good health, and that the matter about which he had consulted Dr. Hirsch in February and March of 1947, was a mere passing ailment and temporary, which no one looked upon as serious (R. 94). The Trial Court refused to admit any of the evidence (R. 95, 103, 104, 106, 108, 111); this was challenged as error in the Circuit Court of Appeals and not mentioned by that Court in its opinion. The Trial

Court did admit evidence as to Mr. Dampf's known good character and reputation; this evidence was uncontradicted. Despite the action of the Trial Court in sustaining every objection made by counsel for respondent respecting lay testimony as to Mr. Dampf's physical condition and as to his conduct, appearance, actions, and state of mind as evidenced thereby, some testimony touching those points did get into the record; it was all to the effect that Mr. Dampf thought he was completely well and healthy (R. 91-93, 111, 113).

Respondent's non-expert witness Dr. Hirsch testified that sugar in the urine could be due to various causes, not necessarily to diabetes (R. 33, 49).

Dr. Albert O. Jimenis, associate medical director of respondent, testified that respondent did not insure diabetics (R. 57, 58); however, he made it clear that the statement of one local physician that a man was a diabetic was not always accepted as correct by respondent, and that respondent usually had such an alleged condition checked by its field examiner (R. 57), (which was done in this case, as well as having a urinalysis made in the respondent's home office).

At the close of all the evidence petitioner moved for a directed verdict in his favor on the ground that defendant had failed to sustain the burden it assumed of proving, by a preponderance of the evidence, that the answers given by Mr. Dampf in his application were false and fraudulent and known by him at the time to be false and fraudulent, and were made for the purpose of deceiving respondent as to the true condition of his health in order to secure the issuance of the policy; and further on the ground that there was no causal connection whatever between the alleged condition allegedly fraudulently concealed by Mr. Dampf, and his death (R. 117, 119-120).

Respondent moved for a directed verdict in its favor asking that the policy be declared null and void "by reason of fraud on the part of Jacob M. Dampf" (R. 119).

The Trial Court overruled petitioner's motion and granted respondent's motion (R. 127).

Fifth: Appeal was taken to the Fifth Circuit Court of Appeals by petitioner, wherein numerous specifications of error were alleged, including error in admitting some of respondent's evidence and rejecting evidence offered by petitioner, error in permitting Dr. E. K. Hirsch to testify over objection, and error in overruling petitioner's motion and granting respondent's motion. One of the Judges of the Appellate Court considered it advisable or necessary to write a concurring opinion.

The Circuit Court of Appeals, with one Judge writing a concurring opinion in which apparently he changed his mind about the substantive law of Louisiana (R. 185), affirmed the judgment (R. 185). The Appellate Court did not notice any of the specifications of error respecting rejection of evidence, but mentioned only the question of whether or not Dr. Hirsch should have been permitted to testify over the objection that his testimony would derive from privileged communications, and the question of whether or not the Trial Court erred in directing the verdict for respondent at the close of the trial (R. 179).

In its opinion the Circuit Court of Appeals specifically declined to find Mr. Dampf guilty of fraud. Fraud had been charged by respondent in its answer, and respondent's motion was squarely bottomed on this charge of fraud (R. 119). But the Circuit Court of Appeals based its opinion on the propo-

sition that, even in the absence of fraud, and even admitting the good faith of Mr. Dampf, if facts thought by the Court to be material were not disclosed in the application for insurance and if respondent produced testimony to the effect that it would not have issued the policy if that fact or those facts had been disclosed, as a matter of Louisiana law the policy is vitiated. The Appellate Court specifically refused to take into consideration the fact that the alleged matter allegedly fraudulently concealed had nothing whatever to do with the death of Mr. Dampf.

With all due respect to the Appellate Court, we submit that the law of Louisiana does not support its decision, but rather a contrary result.

Sixth: After his petition for rehearing was denied (R. 195), petitioner instituted this proceeding to secure a review and reversal of the judgment of the Circuit Court of Appeal, and to establish that the Appellate Court failed to determine and apply substantive law of Louisiana, and erred in rejecting admissible evidence, and has deprived petitioner of his right to jury trial guaranteed by the Seventh Amendment to the Constitution of the United States.

3.

JURISDICTIONAL STATEMENT

1. The jurisdiction of this Court is invoked pursuant to Judicial Code, Section 240, as amended by the Act of February 13, 1925, 43 Stat. 938 U.S.C.A., Title 28, Section 344.

2. The date of the original judgment of the Circuit Court of Appeals sought to be reversed is February 1, 1949; (R. 187); petition for rehearing was filed in that Court on February 17,

1949, within the time prescribed by the Rules of the Fifth Circuit Court of Appeals (R. 188); the petition for rehearing was denied without opinion on March 31, 1949 (R. 195); on April 11, 1949, the issuance of the Mandate was ordered stayed for thirty days from said date.

3. Petitioner invokes the jurisdiction of this Court on the ground that in holding that even though the insured was not guilty of fraud and was acting in good faith, and even though the alleged condition allegedly concealed had no causal connection whatever with the death of the insured, nevertheless as a matter of Louisiana law the policy was invalid, the Circuit Court erred; this holding is directly contrary to the decisions of the Louisiana Supreme Court, and the Circuit Court of Appeals has thus decided an important question of local law in a way directly in conflict with applicable local decisions. Furthermore, the jurisdiction of this Court is invoked on the ground that in affirming the direction of verdict for respondent, the Circuit Court of Appeals deprived petitioner of the right to trial by jury as guaranteed to him by the Seventh Amendment to the Constitution of the United States, thereby deciding a Federal question in a way which conflicts with the Constitution of the United States and with the applicable decisions of this Court.

4.

QUESTIONS PRESENTED

The following questions are presented in the case at bar, in which the jurisprudence of Louisiana was applicable since jurisdiction of the District Court rested on diversity of citizenship:

1. In failing to apply the principles of Louisiana law as announced by the Louisiana Supreme Court and particularly in the case of *Valesi v. Mutual Life Insurance Company of New York* (La. Sup. Ct. 1/30/22, reh. den 3/27/22) 91 So. 818, 151 La. 405, did the Fifth Circuit Court of Appeals err in concluding that in the absence of fraud, and absent any causal connection between death and the alleged condition allegedly fraudulently concealed, nevertheless the insurance policy was invalid?

2. In failing to apply Louisiana law to the effect that in the absence of such causal connection and in the absence of fraud, the policy was valid, did the Fifth Circuit Court of Appeals err in failing to order entry of judgment for petitioner on his motion?

3. Even if petitioner was not entitled to a directed verdict in his favor, in approving the direction of verdict for respondent, did the Fifth Circuit Court of Appeals deny petitioner the right to trial by jury guaranteed to petitioner by the Seventh Amendment to the Constitution of the United States?

4. In failing to notice the errors relating to admission of and rejection of evidence, which errors if corrected might reasonably change the result, did the Circuit Court of Appeals err?

5.

REASONS RELIED UPON FOR ALLOWANCE OF WRIT

The law of Louisiana is perfectly plain and clear to the effect that in the absence of any causal connection between the matter allegedly fraudulently concealed and the death of

the insured, a false answer or answers given by an insured in an application for life insurance will not vitiate the policy unless the insured was guilty of actual fraud. The case of *Valesi v. Mutual Life Insurance Company of New York*, supra and infra, squarely so holds.

Respondent full well realized that such is the law of Louisiana, for the very answer of respondent specifically charged that Mr. Dampf was guilty of fraud with intent to deceive (R. 8). The written motion for a directed verdict filed by respondents concluded with this statement:

> "Therefore, this policy must be declared null and void by reason of fraud on the part of Jacob M. Dampf, in the inception of the insurance contract" (R. 119).

And yet the Circuit Court of Appeals has specifically refused to determine the question of fraud vel non. Said the Circuit Court:

> "Whether false answers knowingly made are fraudulent, as a matter of law, we need not now decide. It is sufficient, if admitting the good faith of the insured, the evidence establishes misrepresentation of a material fact of such import that had the truth been revealed the policy would not have been issued. Assuming that the insured was not guilty of fraud but was acting in good faith, the decisive question is whether the misrepresentations were material to the risk." (R. 184).

This is directly contrary to the law of Louisiana as expressed by the Louisiana Supreme Court. The statement of the Circuit Court of Appeals above stated would be in accord with the law of Louisiana, if, and only if, the alleged condition allegedly concealed had contributed to or caused the death.

It is now and always has been the law of Louisiana that in the absence of any causal relationship between death and the condition concealed or not disclosed in the application for life insurance, the policy would be vitiated because of such concealment or non disclosure only if there was actual fraud on the part of the insured.

And it is now and always has been the law of Louisiana that fraud is never presumed; that the burden of proving fraud is on him who alleges it; and that even if there is strong evidence of fraud, whether or not there was actual fraud in a life insurance case or any other type of case is a question of fact for the triers of the facts, and not a question of law.

In addition to the failure of the Circuit Court of Appeals to determine and follow Louisiana Law, the Circuit Court took unto itself the right to conclude that the insurance company, respondent herein, would not have issued the policy in question if different answers had been given. Under Louisiana jurisprudence that is a question of fact; not law. The testimony of respondent's associate medical director was somewhat vague to say the least; but if the full page advertisement of this respondent published in the Saturday Evening Post (which was offered by petitioner and excluded (R. 73-76) is considered, the very least that can be said is that the publication of this respondent creates an inference directly contrary to the testimony of its associate medical director. Since this advertisement was excluded, in order that Your Honors may see its import, it has been reproduced and a copy is found at the end of this petition and brief as Appendix-A. A similar advertisement, in another publication, is also found as Appendix-B. Appendix-B was not offered for the reason that it would have been futile to do so since Appendix-A was excluded.

In the case of *Cunningham v. Pennsylvania Mutual Life Insurance Company* (La. Sup. Ct. 11/27/22, reh. den. 1/27/23) 95 So. 110, 152 La. 1023, the Louisiana Supreme Court sitting as a trier of the facts squarely stated that it was not obliged to accept and it specifically did not accept the uncontradicted testimony of a head medical director of the defendant company in that case to the effect that he would not have approved the application for insurance had he known the facts which were allegedly fraudulently concealed.

We therefore submit that since there was no causal connection between the matter allegedly concealed in this case and the death, it was essential to respondent's defense under Louisiana law to prove fraud; and that either petitioner's motion for a directed verdict in his favor should have been granted on the ground that fraud had not been proved by a preponderance of the evidence, or at least the matter should have been submitted to a jury. We further submit that the question of whether or not respondent would have rejected this policy if the answers in the application for insurance had been otherwise, is under Louisiana law a question of fact for triers of fact. This is certainly true if the widely circulated advertisements of this respondent are considered, as they should have been and should be, for the very least that can be said is that those advertisements plainly show that respondent believed and published the statement that "in many mild cases, especially when diabetes is discovered early, correct diet alone can control the disease." (Quoted from Appendix-A).

6.
CONCLUSION

Applicant alleges that the rules of this Court have been fully complied with.

Wherefore, for the reasons stated herein, it is respectfully submitted by petitioner that this case is one calling for the exercise by the Court of its discretionary powers, in order that the errors herein pointed out may be corrected; in order that petitioner may not be deprived of his constitutional right to trial by jury; and in order that justice may be done. And to such ends, petitioner respectfully submits that a writ of certiorari should be granted and that this Court should review the decision of the Circuit Court of Appeals for the Fifth Circuit and finally should reverse it, and either should enter verdict in favor of petitioner on his motion for a directed verdict in his favor, or should remand the case with instructions for judgment to be entered on petitioner's motion for a directed verdict in his favor, or should remand the case with instructions for trial to a jury under appropriate instructions respecting Louisiana law, and with proper rulings on admission of and rejection of evidence.

LYMAN P. RHODES, JR., Petitioner

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BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

STATEMENT OF JURISDICTIONAL GROUNDS

A concise statement of the grounds on which the jurisdiction of this Court is invoked will be found in the preceding petition at pages 9-10.

STATEMENT OF THE CASE

A concise statement of the case containing all that is material to the consideration of the questions presented with appropriate page references to the printed record will be found in the preceding petition at pages 3-9.

SPECIFICATIONS OF ASSIGNED ERRORS

A specification of the questions involved and of the errors attributed to the Circuit Court of Appeals which are intended to be urged before this Court will be found in the preceding petition at pages 10-11, as required by paragraph 2 of Rule 38.

ARGUMENT

QUESTIONS 1. AND 2.

There are two facts in this case which transcend all others.

One is that the matters about which Mr. Dampf consulted Dr. Hirsch some three months or so before he applied for the policy in question, had nothing whatever to do with his death.

The second is that Mr. Dampf was not shown to have been guilty of active fraud with intent to deceive, but was shown to have been in entire good faith; and indeed the Appellate Court specifically by-passed the question of fraud.

That *Erie Railroad Company vs. Tompkins* (4/25/38) 304 U.S. 64, 58 S.Ct. 817, 82 L. Ed. 1188, 114 A.L.R. 1487, requires a determination of Louisiana law and an application of Louisiana law to this case, is now beyond dispute.

What is the law of Louisiana on this subject?

It was definitely and positively announced by the Louisiana Supreme Court in the year 1922, and has been the law of Louisiana ever since.

The Louisiana Supreme Court squarely stated in unequivocal terms that misrepresentations would vitiate the policy only (1) if they amounted to a fraud or (2) if the matters concealed or not disclosed had causal connection with the death.

We refer to the case of *Valesi vs. Mutual Life Insurance Company of New York* (1/30/22, reh. den. 3/27/22) 91 So. 818, 151 La. 405. The opinion of the Court was delivered by Justice Dawkins, then a member of the Louisiana Supreme Court, now and for many years in the past the presiding Judge in the United States District Court for the Western District of Louisiana.

In that case, Mrs. Valesi, beneficiary, sued on a policy of life insurance covering the life of her husband. The defense was suicide within the contestable period, and fraudulent misrepresentation of the insured in his application as to the use of intoxicants but for which the policy would not have been issued. Plaintiff had judgment in the lower Court and this was affirmed by the Louisiana Supreme Court.

The Court discussed Act 52 of 1906 of Louisiana as amended by Act 227 of 1916, providing that "all statements

purporting to be made by the insured shall in the absence of fraud be deemed representations and not warranties" in dealing with the question of alleged fraudulent misrepresentation by the insured. And the Court specifically said that a misrepresentation would vitiate a policy only if the matter concealed or not disclosed or misrepresented contributed directly to the death of the insured, or if it was fraudulent. Said the Court:

> ". . . the same (i. e., false answers) would have the effect of a warranty and vitiate the policy only if he concealed the true facts in such a manner as to amount to a fraud or in case the misrepresentation contributed directly to the death. . ."
>
> (Words in parentheses supplied).

Further, the Court said:

> "Conceding that they [i. e., answers in the application] were false but not fraudulently so, this would not defeat recovery (being considered as representations) unless the use of intoxicants had contributed in some way to his death; which we find was not the case in this instance." (Words in brackets supplied).

The authority of the *Valesi* case has never been abrogated.

The Fifth Circuit Court of Appeals cited the following Louisiana Supreme Court decisions, which are listed in chronological order:

> *Cole v. Mutual Life Insurance Company* (11/13/11, reh. den. 12/11/11), 129 La. 704, 56 So. 645;
>
> *Goff v. Mutual Life Insurance Company* (6/13/12) 131 La. 98, 59 So. 28;
>
> *Lee v. New York Life Insurance Company* (1/6/19, reh. den 2/3/19) 144 La. 445, 80 So. 652;

Valesi v. Mutual Life Insurance Company of New York (1/30/22, reh. den. 3/27/22) 151 La. 405, 91 So. 818;

Cunningham v. Penn Mut. Life Insurance Company (11/27/22, reh. den. 1/27/23) 152 La. 1023, 95 So. 110;

Carroll v. Mutual Life Insurance Company of New York (6/17/29, reh. den. 7/8/29), 168 La. 953, 123 So. 638;

Mutual Life Insurance Company of New York v. Rachal (1/6/36, reh. den. 3/2/36) 184 La. 430, 166 So. 129.

Recovery was allowed on the policy in every case above cited except that of *Lee v. New York Life Insurance Company*. In fact, the opinion of the Fifth Circuit Court of Appeals is based almost entirely on the *Lee* case, supra.

But the important and controlling difference between the *Lee* case and both the *Valesi* case, upon which we rely, and the case at bar, is this. In the *Lee* case the insured had been treated on several occasions for Bright's disease, and his answers in his application did not disclose those treatments or the names of the doctors who gave them; and the insured died of that very condition, namely, Bright's disease. The *Lee* case would be square authority for respondent and against petitioner, and would support the decision of the Fifth Circuit Court of Appeals in the instant case, if, and only if, Jacob M. Dampf had died of diabetes instead of from coronary thrombosis, admittedly an entirely unrelated cause.

But Mr. Dampf did not die of diabetes. He died of the very thing which he had freely and unhesitatingly stated, in his application, had claimed both his father and mother—heart trouble. And the *Valesi* case, supra, decided some three years after the *Lee* case, and never since overruled or otherwise abrogated in any way, states the law of Louisiana to be that absent any causal connection between matters which

would have been revealed had there been no failure to disclose or misrepresentation, and the death of the insured, actual fraud on the part of the insured must be alleged and proved if recovery on the life insurance policy is to be denied.

The Fifth Circuit Court of Appeals states that the argument that the misrepresentation was immaterial because "the insured died from coronary thrombosis and not from diabetes, we think begs the question." But in determining whether or not actual fraud must be alleged and proved, the Louisiana Supreme Court in the *Valesi* case has unmistakably said that the very first question to be determined is whether or not the alleged matters allegedly concealed had causal connection with the death. In the face of the *Valesi* case, clearly, the inquiry in a case of this character must concern itself with the cause of death and the relationship of that cause to the facts allegedly concealed; and to suggest that such an inquiry "begs the question" is, we submit, to ignore completely one of the two vital questions in the case which the Louisiana Supreme Court has unequivocally stated must be answered.

That respondent's able Louisiana counsel full well realized the necessity of alleging and proving fraud on the part of Mr. Dampf in this case is, as above suggested, illustrated by the fact that not only does respondent's answer allege that Mr. Dampf's answers in his application were false and fraudulent and known by him to have been false and fraudulent, but also that the answers were made by him "for the purpose of deceiving defendant as to the true condition of his health in order to secure the issuance of said policy" (R. 8), and in its motion for a directed verdict respondent squarely asked that the policy be declared null and void "by reason of fraud on the part of Jacob M. Dampf" (R. 119).

Since in the absence of causal connection between the condition allegedly concealed and the death, a determination of whether or not Mr. Dampf was guilty of fraud with intent to deceive was essential under Louisiana law, and since the Fifth Circuit Court of Appeals admittedly would not and did not consider that question, that alone, we believe, requires that Your Honors grant certiorari herein and thereafter grant or order such relief as you believe appropriate.

QUESTION 3.

If verdict should not have been directed in petitioner's favor, was petitioner entitled to have his case submitted to a jury?

We again mention that this was a business policy, one of two reciprocal policies taken out in favor of each other by business partners with no right reserved to change the beneficiary. Petitioner offered to prove (R. 115) that he paid the premium on the policy of Mr. Dampf, and that Mr. Dampf paid the premium on the policy on the life of the petitioner. The good faith of petitioner himself has not been questioned by anyone. Presumably the details of this business arrangement were fully known to respondent and its agents.

Only Mr. Dampf was charged by respondent with fraud with intent to deceive, and it is the law of Louisiana, as elsewhere, that fraud is never presumed, and the burden rests upon the person alleging fraud to prove it. See *Mutual Life Insurance Company of New York vs. Rachal*, supra.

There was no evidence whatever to the effect that Mr. Dampf had ever been told, or believed, or had reason to believe, that he was seriously ill or that he thought or should

have thought that the matter about which he consulted Dr. Hirsch would have any tendency to shorten his life. The sugar in his urine quickly disappeared, and he was convinced, as the record abundantly shows, that he was perfectly well long before he applied for this insurance policy (R. 92, 93, 111, 113). Petitioner's attempts to produce additional testimony to the effect that ". . . during the period of time from approximately in March, 1947, until the time of the death of Mr. Dampf, in September, 1947, that the actions, conduct, and words of Mr. Dampf, and the manner in which he lived and acted, indicated that Mr. Dampf did not believe he was ill during that period, but, on the contrary, was in good health; and that the matter about which he had consulted Dr. Hirsch in February and March, of 1947, was a mere passing ailment and temporary, which no one looked upon as serious," were prevented by objections which were sustained by the Trial Court (R. 93, 94, 95, 103, 104, 106, 108).

Although the Trial Judge refused to admit the above-mentioned testimony, he did permit proof of Mr. Dampf's good character. We did not then quite understand and do not now quite understand why proof of good character was admissible if the other evidence was not; we felt then and feel now that all the evidence was admissible. In any event, Mr. Dampf's good character and reputation were fully shown.

So we have a case of a man of mature years who did not believe he was ill at all, and who was thoroughly convinced that such slight indisposition as he did have completely cleared up within a few days, a man of very high character and reputation, and a man who applied for an insurance policy, under which he, himself, was not obliged to pay the premium as it

was to be paid and was paid by the beneficiary and owner, his business partner.

There was no reason in the world for Mr. Dampf to misrepresent anything he thought might have been material. If Mr. Dampf had answered the questions in the application as respondent now, after he is long since dead, says he should have answered them, and even if respondent despite its own medical examinations conducted independently and its tests of Mr. Dampf's urine in its home office, which admittedly were done and made, had decided not to issue this policy, it is a fact of which we believe Your Honors can take judicial notice that a policy could have been obtained from some other company, though possibly at a premium rate higher than the rate for that particular age. Indeed, petitioner offered to prove that; objection to that testimony was sustained by the Trial Court (R. 76, 77).

It would not have cost Mr. Dampf one penny for his policy to have been issued by some other company than respondent even if the rate had been higher; petitioner was the one paying the premium on Mr. Dampf's policy and not Mr. Dampf. These two men wanted protection for their business; and it would be ridiculous to believe that Mr. Dampf would have done anything to jeopardize those business policies particularly when any increase in the premium on Mr. Dampf's policy would be borne not by Mr. Dampf, but by Mr. Rhodes.

No expert medical witness has ever yet testified that Mr. Dampf had diabetes or was thought to have diabetes. Dr. Hirsch repeatedly and consistently refused to testify as an expert. And the testimony of Dr. Hirsch on which respondent

relies conflicts with his own written statement. In defendant's exhibit D-12 (R. 173) in answer to the question reading:

> "Give the date, cause, duration, and result of each illness for which you treated the deceased within five years prior to death,"

Dr. Hirsch gave as one of the dates 28 February 1947; gave as the cau diabetes mellitus, with a question mark after that cause; and gave the duration as "not long (see above)." On the line above under "result" is stated "well (no findings)." Further under the heading "result" Dr. Hirsch stated "sugar free since Mch. 25- 1947."

The question mark which Dr. Hirsch placed after the words "diabetes mellitus" indicates quite plainly his own doubt as to his diagnosis. And that Mr. Dampf was well, with no findings, and sugar free after March 25, 1947, which was approximately three months before the policy in question was issued, is shown by respondent's own exhibit.

The best that could be said for respondent's case is that issues of fact were thus presented by respondent's own evidence not only as to whether or not Mr. Dampf ever did have any diabetes at all, but also as to whether or not he had any reason whatever to think he was ill after March 25, 1947. And the way Mr. Dampf acted and lived and spoke thereafter, his actions, words, and conduct, were matters properly to be considered by a jury along with the other evidence, in determining whether or not these issues of fact were to be resolved in favor of petitioner or respondent.

From Couch, Cyclopedia of Insurance Law (1931) Vol. 3, Section 782, we quote the following:

> "*Duty to disclose as affected by belief as to materiality of facts.* . . . It has been held, even in England, that if

there is no designed and intentional withholding, and no fraud, the failure to disclose, resting entirely upon the honest belief that the fact is not material, will not avoid the contract. And there are American decisions in line with this decision, it being held that, if the facts not disclosed are not material in the mind of the insured, the policy is not thereby vitiated, there being no intended or designed withholding or fraud. Again, if such rulings be held not to express a sound view of the law, then where must the line of demarcation be drawn? All disorders of the system may have a tendency in some degree to shorten life. Must the insured give a careful and exact history of all his disorders, temporary illnesses, and the like, without regard to their permanent effect upon his physical health? If so, then it is doubtful if recovery could be had upon any life policy, for all lives would be rendered uninsurable.

* * *

"Summarizing the decisions, they seem to agree that the terms 'sickness' and 'disease' do not mean a trifling illness or occasional physical disturbances resulting from accidental causes, and not permanent in their effects, or a temporary illness which readily yields to professional treatment and leaves no permanent physical injury or disorder, calculated, or having a tendency, to shorten life . . .

* * *

"But if the insured at the time of effecting the policy is in such a condition of health and strength as would warrant a reasonable and honest belief that his health is good, and that he is free from disorders, and disease or symptoms of disease, which would tend to shorten life, and this fact is not one which he ought reasonably to know, and he is not guilty of any negligence in failing to learn his physical condition, then his policy ought

not to be vitiated, though he fails to disclose that he has had some disorder, sickness, or symptom of disease, even though it might actually be material. The question should be left to the jury whether the insured truly represented the state of his health so as not to mislead or deceive the insurer . . ."

The Louisiana authorities demonstrate unquestionably that such issues are fact issues and are for the trier or triers of the fact. In every case the Louisiana Courts, sitting as triers of the fact, have considered all of the evidence and particularly evidence as to the actions, words and conduct of the insured, in determining whether or not an answer or answers though technically and actually false or untruthful, should be allowed to void the policy.

For instance, in the case of *Cunningham vs. Pennsylvania Mutual Life Insurance Company*, supra, plaintiff sued upon a policy of insurance on the life of her deceased husband who was himself a physician. The policy was issued in January, 1916; the insured died in November, 1916. The application asked when the insured was last attended by a physician or consulted one, for what disease the insured consulted or was attended by a physician, and that the name and residence of the physician and full details be given. The answers were that he had last seen a physician about ten years before, for malaria, and the name was given as Dr. R. E. Webb of Rayne, Louisiana, and it was stated that complete recovery followed an illness of two or three days. The evidence was undisputed that on May 30, 1914 in New Orleans the deceased visited a firm of specialists in genito-urinary diseases, was examined and treated there, and returned at intervals three or four times until June 26, 1914; and that these specialists diagnosed his trouble as slight non-gonorrheal prostatitis and vesiculitis. The

head medical director of defendant said he would not have approved the application had he known those facts.

In affirming judgment for plaintiff, the Louisiana Supreme Court said:

> "It is entirely possible for answers to such questions to be knowingly untrue from a literal standpoint, and yet not fraudulent, for the applicant may, in good faith, have considered the facts not of sufficient importance to report, especially in view of the law, as announced by the decisions of this court and sustained by the jurisprudence of the other states, to the point that inconsequential illnesses do not have to be disclosed, even though they may have occasioned the attendance of a physician. *Goff et al. v. Mutual Life Ins. Co.*, 131 La. 98, 59 South. 28, *Cole v. Mutual Life Ins. Co.*, 129 La. 704, 56 South. 645, Ann. Cas. 1913B, 748, and authorities cited in those cases. Nothing is charged to show that, if the information was material, deceased knew of it, or that his action was not due to honestly mistaken judgment."

And the Supreme Court of Louisiana, as a trier of the facts, even stated positively that despite the fact that the head medical director testified that he would not have approved the application had he known the true facts, it was not obliged to accept that testimony but could determine for itself, on all the evidence, whether or not the insurer would have declined the application. In other words, the Louisiana Supreme Court squarely announced the rule of law to be that as a trier of the facts, it had a right to determine from all the evidence whether or not the policy would have been rejected, even though there was uncontradicted testimony from the head medical director of the defendant company that the policy would have been rejected.

In the case of *Blackwell v. Fireside Mutual Life Insurance Company* (1st Cir. App. La. 12/29/42) 11 So. 2nd 65, the insured had one of her breasts removed on June 21, 1938; she returned home on July 6, 1938, and applied for insurance the following day. Cancer caused her death on October 16, 1939. In the application she signed, when asked whether or not she had ever undergone a surgical operation she stated "operated on for female trouble in 1932," She denied having consulted a physician within the past two years. The policy was issued July 11, 1938, and after her death payment was refused on the ground of fraud and misrepresentation; suit followed and the beneficiary recovered. Although it is true that the policy in that case was issued without a medical examination and one of the grounds of the decision was that because of that fact the company was estopped from setting up alleged misrepresentations as a defense to avoid payment, nevertheless in speaking of the answers given by the insured in her application and the legal effects to be given to those answers in Louisiana, the Court said this:

> "Obviously, the above answers were untrue. Whether or not they were wilfully given with the intent to deceive and defraud depends very much on the importance that the applicant attached to them and her purpose in not giving all the facts, as well as her knowledge of the serious nature of her complaint and whether or not she actually believed that the operation she had undergone had corrected her trouble. Answers in an application for life insurance may be knowingly untrue and yet not fraudulent. *Cunningham v. Penn Mutual Ins. Co.*, 152 La. 1023, 95 So. 110."

Any doubt whatever as to whether or not these are fact issues or law issues is completely dispelled by the decision of

the Louisiana Supreme Court in the case of *Cole v. Mutual Life Insurance Company of New York*, supra, which specifically states that questions such as the one involved here are questions of fact. In that case the Court said this:

> "On the merits, the contention of the defendant is that the statements made by the assured in his application for reinstatement, to the effect that, 'except as noted below, his health has been good and has remained unimpaired since the last examination for policy No. 1,384,385,' and that 'he has not consulted a physician since that time,' were false, and have had the effect of avoiding the policy.
>
> "This raises a question of fact, for the determination of which an examination for the facts is necessary.
>
> * * *
>
> "From the foregoing evidence it is perfectly clear that the assured was sincere in saying that he was in good health.
>
> * * *
>
> "That the assured, when making his application for reinstatement, did not look upon these consultations (if, indeed, they had then already taken place) as having been such within the intendment of the policy, appears from his not having mentioned them in his statement. He would have been without motive for making a secret of them, for there can be no doubt that he did not consider this soreness of his throat as having been or being anything serious.
>
> * * *
>
> "The evidence leaves no doubt that he, his mother, and his wife, and even Dr. McLemore, considered his sore throat nothing more than a common, temporary inflammation of the throat—a mere trivial, passing ailment, not impairing the general health."

On the question of Mr. Dampf's good faith and state of mind, and his belief as to whether or not he was ill, we believe the following is of extreme significance. He stated in the application that his father died of arterio-sclerosis and that his mother died of a heart attack. He himself died of coronary thrombosis. In laymen's language, Mr. Dampf himself died of a heart attack (R. 63). It stands to reason that because of the death of his father and mother from that very cause, Mr. Dampf had cause to believe that heart trouble would eventually claim him, as in fact it did. And yet the fact that it had claimed both of his parents was openly stated by him. If he had really felt that anything should have been concealed, it stands to reason that the cause of death of his parents would have been the things that he would have concealed.

We believe the above clearly demonstrates that under Louisiana law fact issues are involved which should have been submitted to a jury, the trier of the facts.

QUESTION 4.

We mention, only briefly, errors in the admission of and rejection of evidence.

a. Cross-examination of a witness was permitted, over objection, touching matters not inquired into on direct examination (R. 16-17). A recent case, *Zumwalt v. Gardner* (8th C.C.A., 4/4/47) 160 F. 2nd 298, at page 303, declares this to be error. It is of no particular importance, but if this case is remanded for re-trial a similar error might be prejudicial.

b. A certificate of death was admitted in evidence, over objection, for purposes beyond that of showing the cause of death (R. 19-87). This also, is mentioned, primarily to protect the point in the event of re-trial.

c. A widely circulated advertisement of respondent respecting diabetes, which materially conflicted with testimony given by respondent's chief medical witness on the witness stand, was not admitted in evidence (R. 76). This advertisement, and a similar one, to which reference has previously been made, are appended to this brief as Appendix-A and Appendix-B. This error was clearly prejudicial if, as we contend, fact issues are involved.

d. Testimony that other companies would have insured Mr. Dampf, even if he were a known diabetic, was not admitted (R. 77). This was clearly relevant and admissible on the question of Mr. Dampf's good faith, since he was not obliged to pay the premium on the policy on his life; and the error was prejudicial.

e. Testimony of numerous witnesses as to what the insured's actions, conduct, and words indicated, respecting his physical condition, prior to and at the time the insurance policy in question was applied for and issued, was excluded (R. 93, 94, 95, 96, 99, 100, 103, 104, 106, 108). This testimony was clearly admissible as touching on Mr. Dampf's good faith, on whether or not he was guilty of fraud, and on whether or not he believed or had reason to believe that he had any serious illness or disease. We consider this error highly prejudicial.

f. Testimony that petitioner, the insured's business partner, paid the premium on the policy sued on, offered to show that Mr. Dampf had no reason to misrepresent facts in order to get a cheaper premium rate, was excluded (R. 115-116). This testimony was admissible to show that Mr. Dampf had no pecuniary reason whatever to attempt to defraud or deceive this respondent; even if this respondent had refused to

issue the policy, he could and would have obtained one elsewhere and if it did cost more money, Mr. Rhodes and not Mr. Dampf would have been the one to pay it. Again prejudice is claimed by petitioner because of this error.

We mention these errors in admission and rejection of evidence primarily so that, if Your Honors grant certiorari as we believe you will, you may, if you care to do so, consider these errors as well as the principal features of this case.

CONCLUSION

Admittedly there was no causal connection whatever between the matters about which Mr. Dampf consulted Dr. Hirsch on four occasions between February 28, 1947, and March 25, 1947, and Mr. Dampf's death during the night of September 10-11, 1947. That being true, under Louisiana law Mr. Dampf's failure to disclose his consultations with Dr. Hirsch when he applied for the policy sued on, does not vitiate the policy unless Mr. Dampf's actions constituted actual fraud. This was recognized by respondent in its answer to the complaint, and its motion for a directed verdict; but the Fifth Circuit Court of Appeal did not apply the law of Louisiana as expressed in the case of *Valesi vs. Mutual Life Insurance Company*, supra, and instead decided this case as if a determination of whether or not Mr. Dampf was guilty of fraud with intent to deceive was unnecessary. This alone, we believe, justifies and requires that certiorari be granted.

Since fraud was not proved by a preponderance of the evidence, petitioner was entitled to a directed verdict in his favor. But if it can be said that the evidence touching fraud conflicted (the best possible view from respondent's stand-

point), Louisiana Courts sitting as triers of the facts have uniformly treated questions such as are presented in this case as questions of fact. In at least one case, *Cole v. Mutual Life Insurance Company of New York*, supra, the Louisiana Supreme Court has specifically stated that questions such as the ones involved here are questions of fact.

Therefore, in a Federal Court sitting in Louisiana in a diversity case, such as this, where a jury trial was properly demanded, it is error for a Judge or Judges on conflicting evidence to take the case from a jury; and this is particularly true where, as here, widely published advertisements of respondent itself materially conflicted with the testimony of respondent's chief medical witness to the effect that respondent would have rejected this policy if it had known all of the facts which it now contends it should have known. The advertisement should have been admitted in evidence, and should have been submitted to the jury along with all the other evidence so that the jury might have weighed all reasonable inferences to be drawn therefrom against the rather vague testimony of respondent's chief medical witness.

Errors occurred in the admission and rejection of evidence which this Court may desire to comment upon, or correct, if the Court grants certiorari, as we believe it will.

Petitioner humbly requests this Court to exercise its discretionary power to the end that justice may be served in this case and that either judgment be rendered in favor of petitioner, or the case be remanded with instructions for submission of the whole case to a jury under appropriate instructions as to Louisiana law and with proper rulings on admissibility of evidence.

All of which is most respectfully submitted.

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